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## Editorial

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# Editorial

Kurt Siehr\*

On June 24, 1995 a diplomatic conference in Rome adopted the final version of the Unidroit Convention on Stolen or Illegally Exported Cultural Property.<sup>1</sup> Ten years earlier, UNESCO and other international organizations had suggested that the International Institute for the Unification of Private Law (Unidroit) in Rome prepare a draft agreement for the international protection of cultural property. This new agreement would require the States Parties to return stolen cultural objects and those cultural objects illegally exported from the territory of a Contracting State.

Seventy States sent representatives to the Diplomatic Conference, while eight States and several intergovernmental and non-governmental organisations sent observers. The final version of the Convention was approved by 37 States (including Australia, Canada, France and Italy); 5 States (including Algeria, Egypt, Libya, and Morocco) voted against it, and 17 States (including Germany, Switzerland and the United States) abstained. France and Italy have already signed the Convention which will enter into force after the fifth instrument of ratification, acceptance, approval or accession has been deposited with the Government of the Italian Republic as the depositary.

As the votes on the final version of the Convention indicate, the Convention is still controversial. The States which voted against the Convention wanted to express the view that the instrument does not go far enough and especially does not oblige States to return stolen cultural objects unconditionally, i. e. without compensation of a bona fide purchaser. The abstaining States had many different reasons for their attitude: unclear bases of national legislative jurisdiction (Switzerland), contradiction to domestic legislation (Germany), inflexible and exaggerated reaction to specific situations which should have been treated in a more sophisticated manner (United States).

John Henry Merryman in his introductory article discusses three important departures of the final version from the *Urtext* of the draft: ambiguous terminology vacillating between the clearly defined notion of "cultural object" and the unclear term "cultural heritage" used in the Preamble and in Article 1(b), classification of every unlawfully excavated or unlawfully retained object as stolen in Article

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3(2), and reducing the preconditions under Article 5(3) for an order to return illegally exported cultural objects.

The other article on the Unidroit Convention deals with procedural questions. Article 8(1) attributes jurisdiction to “courts or other competent authorities of the Contracting State where the cultural object is located” and Article 8(2) provides that parties may agree to submit their dispute to arbitration. Emily Sidorsky examines three different models of international arbitration under the Unidroit Convention: the institutional model of the 1965 Convention on the Settlement of Investment Disputes Between States,<sup>2</sup> arbitration according to the Santiago de Compostela Resolution of the Institute of International Law,<sup>3</sup> and the Permanent Court of Arbitration in the Hague under the 1993 Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State.<sup>4</sup>

When international conventions with provisions on prescription do not apply, domestic law, including national statutes of limitations, governs. The decisions in *Solomon R. Guggenheim Foundation v. Lubell*<sup>5</sup> and *DeWeerth v. Baldinger*<sup>6</sup> demonstrate the complex questions which may arise under domestic rules on time limitations. Stephanos Bibas in his paper suggests that the report of an art theft to international databases should exclude any bar to recovery because of lapse of time. These suggestions are especially valuable for Continental-European legal systems with general and inflexible statutes of limitations which are not suitable for stolen cultural objects unless these objects qualify as *res extra commercium*.<sup>7</sup> This may be the case with Italian archaeological treasures to which Diura Thoden van Velzen turns in her paper on Italian *tombaroli*. Her proposals may also be relevant to other source countries with a similar rich archaeological history. The question is: How can local people be prevented from excavating illegally and destroying the context of archaeological objects? Once the archaeological treasures are illegally exported and if no international treaty obliges the importing State to return the treasures, source countries face serious problems to recover their cultural objects. This result has been demonstrated in several law suits. Often the statutes on export and State property are too ambiguous to convince foreign judges of the plaintiff’s allegations.<sup>8</sup> In *United States v. Pre-Columbian Artifacts and the Republic of Guatemala*,<sup>9</sup> annotated by Jason Eyster, the court accepted Guatemala’s statement of its forfeiture law and qualified the illegally exported pre-Columbian artifacts as “stolen” under the U. S. National Stolen Property Act.<sup>10</sup> If the Unidroit Convention were already in force, its Chapter III on “Return of Illegally Exported Cultural Objects” had to be applied or, as John Henry Merryman has shown with justified regret, Chapter II of the Convention and especially Article 3(2) on archaeological objects and on their qualification as “stolen”.

Cultural property is created by human beings who also constitute the biggest danger to such objects. Through negligence, carelessness and indifference, cultural property is exposed to hazards, deterior-

ation and destruction, as shown by ailing museums short of money for maintenance and by collapsing or burning monuments. Even international devastation is still seen. Thomas Fitschen stresses that illicit art trade in times of armed conflicts is forbidden under the 1954 Hague Convention and the Protocol.<sup>11</sup> Talia Einhorn's paper deals with problems of cultural property in times of peace and armistice, as illustrated by the new relationships resulting from the Arab-Israeli peace developments. As early as the end of World War One cultural objects were transferred from Vienna to Budapest and Prague following the dissolution of the Austrian-Hungarian Empire. Today we face the same problems of seceding and dividing States in Eastern and Central Europe.<sup>12</sup> The special problem in Israel is the question of whether objects of Jewish cultural heritage should be given to Palestinian authorities because they were excavated or found outside the internationally recognized borders of Israel. Does the territorial aspect prevail when cultural property has to be attributed to some State or community, or does the religious, cultural and ethnic relation between cultural objects and a certain population prevail?

Fortunately, there are also "peaceful" subject matters treated by various authors. Lyndel V. Prott attended the International Symposium "*The Part of Archaeology in the Cross-Cultural Dialogue*" and wrote an introduction to resolutions adopted in Rüschlikon, Switzerland. Robert K. Paterson provides a short report on the international conference "*Material Culture in Flux: The Law and Policy of the Repatriation of Cultural Property*" held at the Faculty of Law, University of British Columbia in May 1994.<sup>13</sup> Finally the case of *Thomas Holloway's Picture Gallery* is discussed by Derrick Chong as an example of the problem of deaccessioning by British universities and the sale of cultural property on the international art market.

This issue of the International Journal of Cultural Property is the first which was not edited by Norman Palmer, our editor-in-chief of the first four volumes. His successor is Patty Gerstenblith of DePaul University College of Law, Chicago. We are sorry that Norman Palmer is no longer on the Board of Editors of the Journal. We are very grateful for his efforts in launching the Journal and his willingness to assume the burden of the first editor-in-chief. We will remember these efforts and the contributions which Professor Palmer made to the success of the Journal. We are lucky to learn that he will continue to devote himself to our common interest: cultural property and all its legal, cultural and human aspects.

## Notes

1 Cp. the text *infra* at p. 155.

2 Convention of 18 March 1965, 575 U. N. T. S. p. 159.

3 Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises, in: 63 II Yearbook of the Institute of International Law 324 (Session of Santiago de Compostela 1989).

- 4 Reprinted in 19 Yearbook Commercial Arbitration 338 (1994).
- 5 569 N. E.2d 426 (N. Y. 1991).
- 6 658 F. Supp. 688 (S. D. N Y. 1987); 836 F.2d 103 (2d Cir. 1987); relief under Rule 60 F. R. C P. granted 804 F. Supp. 539 (S. D. N Y. 1992); 24 F.3d 416 (2d Cir. 1994) (pending revised opinion); reversed 38 F.3d 1266 (2d Cir. 1994).
- 7 Cp. Siehr, Kulturgüter als res extra commercium im internationalen Rechtsverkehr, in: Lebendiges Recht – Von den Sumerern bis zur Gegenwart. Festschrift für Reinhold Trinkner, Heidelberg 1995, pp. 703 et seq.
- 8 This happened in Swiss court proceedings in which Turkey sued for return of allegedly illegally exported tomb stones. The appeal in this case is still pending with the Federal Court.
- 9 845 F. Supp. 544 (N. D. Ill. 1993).
- 10 18 U. S. C. §§ 2314–15 (1988 and Suppl. 1990). Also the hiding and retaining of war booty may be punishable under the National Stolen Property Act. Cp. David D'Arcy, US indicts war booty sellers. Brother and sister of the US soldier who stole the Quedlinburg treasure to face possible imprisonment, 7 The Art Newspaper, February 1996, pp. 1 and 5.
- 11 Convention and Protocol of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 249 U. N. T S. p. 215.
- 12 Cp. Chronicles, *infra* p. 209 under December 1995, with respect to exchanges of certain paintings between the Czech Republic and the Slovakian Republic.
- 13 The papers of this conference are published in: University of British Columbia Law Review 1995 Special Issue. Material culture in Flux: Law and Policy of Repatriation of Cultural Property. Vancouver, B. C.: U. B. C. Law Review Society 1995. 345 pp.